No. 22091

United States
Court of Appeals
for the Ninth Circuit

SMITH CANNING & FREEZING CO.,
a corporation,

Appellant,

v.

LLOYD KRAUSE, INC., a corporation,

Appellee.

APPELLEE'S BRIEF

Appeal from the United States District Court for the District of Oregon

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APPELLEE'S BRIEF

Appeal from the United States District Court for the District of Oregon

COUNTER - STATEMENT OF CASE

Appellee brought suit upon six written contracts covering the hauling of pea vines by the appellee as a contract carrier for the appellant shipper during the years 1960 through 1965, inclusive.

Said written contracts were submitted to the Oregon Public Utilities Commission as required by law, with the knowledge and concurrence of the appellant. See Exhibit 8, Stoddard deposition, p. 8, line 24 to p. 9, line 5:

Q I think we can agree, can we not, Mr. Stoddard, that all of the contracts from 1960 through 1965 were, to your knowledge, submitted to, and approved by, the Public Utilities Commission of the State of Oregon, particularly with reference to the hourly rates?

A Well, I am sure this is the case. *To my knowledge they had to be filed.* (Emphasis supplied.)

The written contracts submitted were approved by the Public Utilities Commission after the hauling rate that had been established by the commission had been set forth in the contracts (Tr. 10, line 4).

The appellee was paid for the hauling at a rate less than the contract-specified and approved rate, and appellee sued for the difference for the years 1960 through 1965, inclusive.

It was the appellee's position that the Public Utilities Commission had authority to require compliance with rates previously established for common carriers, and the rate, once established and inserted into the contract between the parties, became the only rate that appellee could charge and the rate appellant was required to pay in order to comply with the declared public policy of the state of Oregon to prevent rate discrimination between common and contract carriers.

Appellant challenged the authority of the Oregon Public Utilities Commission to prescribe rates as between

the parties and offered to show by parol evidence another alleged contract between the parties contending that it had been discharged.

The offered evidence was admitted provisionally (Tr. 34, line 2) by the trial court, but ruled inadmissible in the opinion and order (R. 26, p. 3, line 5), and judgment was entered in favor of the appellee in the agreed sum of $66,593.28, plus interest.

Appellant's contention that no common carrier had trucks that could haul pea vines is not substantiated by the record. Tr. 50, line 20, the court asked Mr. Stoddard:

> THE COURT: Except for the number of trucks that you would need, why couldn't Sites come out to your location and with the mechanical loader, why couldn't you load his trucks with these pea vines?
>
> THE WITNESS: Well, in the first place, he doesn't have the size of the trucks.
>
> THE COURT: He doesn't have the two-ton trucks?
>
> THE WITNESS: He doesn't have this size of truck that I *know about.* (Emphasis supplied).

Appellant's contention that the billings by appellee and the payments made show an acceptance in full satisfaction of appellant's obligation is likewise not substantiated by the record. The Stoddard deposition (Ex. 8) at page 9 acknowledged that each statement showed a "difference" between the rate paid and the Public Utilities Commission rate, as is demonstrated by Exhibit 12 itself.

SUMMARY OF ARGUMENT

Appellee's argument in support of the trial court's judgment, opinion and order will be considered under the following subdivisions:

1. The Public Utilities Commissioner had authority to prescribe hauling rates for contract haulers;
2. The commissioner's determination of competition is not subject to collateral attack;
3. The Public Utilities Commissioner having established the hauling rate, there can be no defense to nonpayment thereof;
4. The parol evidence rule bans oral evidence denying the validity of a written contract executed with the intent of misleading a third party;
5. The legal doctrines of modification, discharge, performance or release are not applicable.

Appellee contends that the appellant and appellee entered into a written contract for the avowed purpose of securing the approval of the Oregon Public Utilities Commissioner to rates set forth therein. The Public Utilities Commissioner, acting under the provisions of ORS 767.420 (4)[1], correctly interpreted the word "competition" as used therein to mean that hauling proposed to be done under the written contracts would be in competition with

1. See appendix p. 67

common carriers who had been previously licensed to haul the same commodity, and he prescribed the approved contract carrier rate.

The commissioner having made an administrative determination of competition and prescribed the rate, his determination is not subject to collateral attack.

Where parties have entered into a written contract and submitted it to a third party for approval, with the intention that it will be relied upon, the parol evidence rule prevents the introduction of oral evidence that it was not the true agreement of the parties.

By the overwhelming weight of authority, once a hauling rate is officially established, there can be no defense to nonpayment, including fraud, estoppel, mistake, part-payment, discharge or modification.

ARGUMENT

The Public Utilities Commissioner Had Authority to Prescribe Hauling Rates for Contract Haulers.

Implicit in the trial judge's opinion and order is a finding that the Public Utilities Commissioner had authority to require appellee as a contract carrier to charge the approved contract carrier rate for the hauling in question. (R. 26, p. 4.)

During the trial, the trial court repeatedly stated that the crux of the case was whether or not the commissioner

had authority to establish rates under ORS 767.420 (4) (Tr. 41, 45).

It is therefore necessary to consider the statutes under which the commissioner determined that there was competition under ORS 767.420(4) and required the hauling to be done at the approved rate.

The public policy of the state of Oregon in relation to motor carriers is set forth in ORS 767.020[2]. It provides that the business of operating as a motor carrier is affected with the public interest, and regulated competition is in the public interest to the end, among other things, that discrimination in rates be eliminated.

Hauling can only be done by common carriers and contract carriers after a permit has been secured on application submitted to the commissioner. ORS 767.105[3]. It is required in the application that there shall be set forth the ownership, financial condition, equipment to be used, whether the transportation is to be of persons or of property, and the territory to be served. ORS 767.125[4].

It would seem to follow that if a carrier can only haul after a permit has issued on application in which there must be set forth the equipment owned and the territory to be served, then there is a "holding out as a matter of law" that if the permit is granted, the appli-

2. See appendix p. 63
3. See appendix p. 64
4. See appendix p. 65

cant will perform the services for which he applies. This is borne out by the provisions of ORS 767.190 (e) and (f) [5] which provide for permit cancellation if the carrier has refused or failed to furnish services authorized by his permit, except for reasons beyond his control. In addition, ORS 767.470[6] provides for civil penalties if a carrier violates any of the provisions of ORS 767.

Under the provisions of ORC 767.420[7] the commissioner is given the same supervisory and regulatory powers over contract carriers as common carriers. The contract carrier is required to file any contract for hauling immediately with the commissioner and cannot haul until the contract has been approved. The reason for this requirement as set forth in subsection (2) is to prevent unfair competition or any situation which would injure or destroy the business of any common carrier or the integrity of the state's regulation of the business of any common carrier.

In light of the foregoing statutory provisions, it is necessary to consider the proviso on the commissioner's authority to prescribe rates in contracts of contract carriers, contained in ORS 767.420(4).

It seems clear that the commissioner, under subparagraph (4) of ORS 767.420, is delegated the duty of making

5. See appendix p. 65
6. See appendix p. 67
7. See appendix p. 66

an administrative decision as to whether or not a contract carrier is to haul in competition with common carriers who have previously secured permit authority to haul the same commodity or commodities.

Appellant contends that the commissioner was without authority because of the contention that the commissioner was required to find actual competition with common carriers.

The commissioner is the only one qualified and required to make such an administrative decision because of the provisions of ORS 767.125. No carrier, whether contract or common, can haul without a permit and the approval of the commissioner, and the commissioner has on file in his official records the permits of all carriers and can determine from the permits on file whether the application of a contract carrier is in competition with like permit authority of any and all common carriers, the extent of any previously-authorized permit, routes to be traveled, products to be carried, and, of course, rates to be charged.

It is appellee's contention that the only reasonable interpretation of "competition" as used in ORS 767.420(4) is that it means competition with permit authority previously authorized to common carriers. To construe it to mean actual competition would produce a rather ironic result.

If the commissioner determined, on the day of application by a contract carrier, that there was no actual competition and therefore he was without authority to prescribe the approved contract rate, and the contract carrier agreed with the shipper to haul a given commodity for $1 per ton and the next day a common carrier commenced to haul the same commodity at $2 per ton (upon request by a shipper), public policy of regulated competition would be destroyed.

In this connection it is important to note what the commissioner did in the case at issue concerning competing permitees and competition. Mr. Singleton, who was the Director of Transportation for the State of Oregon, testified in response to question by Mr. Corey (Tr. 8-20):

> Q I see. Could you tell Judge Solomon what administrative functions were involved in your examination of those contracts relative to their approval or rejection?
>
> A Each contract is initially reviewed for the purpose of ascertaining if the transportation proposed to be carried by the contract is within the area the carrier serves or proposes to serve; that the commodities to be transported are within the operating authority as issued by the Commissioner or proposed to be issued by the Commissioner to the carrier either in service or proposed to enter in service.
>
> Another function is then to ascertain if the proposed carrier was in competition with other common carriers.

Q Do you make a determination relative to that? Did you in these instances?

A Yes, sir.

Q Did you conclude there was competition with other common carriers?

A Yes.

Q With other common carriers?

A Yes.

. . .

Q Did you, in the case of Krause and Smith Canning Company contracts, make any determination as to the propriety of the rates specified in those contracts referring to hauling rates?

A That's what we do on review as related to common carriers to see whether the proposed rates and services were consistent with the requirements set out in our statute.

Q Did the office of the Public Utility Commissioner in fact approve the rates of the contracts that were submitted?

A Yes, they did — he did.

THE COURT: You said you reviewed them for the rates and services to determine whether they were consistent with the State standards of the Oregon statutes; is that correct?

THE WITNESS: The statutes as they relate to the contract carriers' contracts as opposed to common carrier tariff.

THE COURT: What was that standard? Did you require that they be competitive with common carriers or that they not be much lower than the common carrier rates, so as not to prejudice the common carriers, or what was the standard?

THE WITNESS: May I read from our statute?

THE COURT: Yes.

THE WITNESS: This is ORS 767.420(2), which says:

> "No contract carrier shall give or cause any undue or unreasonable advantage or preference to those whom he serves as compared with patrons of any common carrier, or subject the patrons of any common carrier to any undue or unreasonable discrimination or disadvantage, or by unfair competition destroy or impair the service or business of any common carrier or the integrity of the state's regulation of any such service or business."

THE COURT: How did you construe that?

THE WITNESS: We construed that, and have consistently, insofar as my memory serves me, since 1933, as meaning competition.

THE COURT: In other words, let me just take an example. If a contract carrier wanted to enter into a contract, say for ten cents a ton mile and the common carrier was charging 20 cents a ton mile, what would you do?

THE WITNESS: We would disapprove the contract.

THE COURT: Suppose that instead, the common carrier was charging 20 cents and the contract car-

rier wanted to charge 30 cents, what would you do?

THE WITNESS: Then, we would approve the contract.

THE COURT: You would approve the contract?

THE WITNESS: Right.

THE COURT: In other words, you didn't want to destroy the common carrier?

THE WITNESS: That's correct. We consider the common carrier as the rate making carrier.

THE COURT: You wouldn't permit any contract carrier to undercut the common carrier to such a degree as to make it impossible for the common carrier to operate?

THE WITNESS: That's correct.

THE COURT: What did you regard as the common carrier within the county, and what county are we talking about?

THE WITNESS: Umatilla County.

THE COURT: What is the common carrier in Umatilla County?

THE WITNESS: Well, a common carrier there in Umatilla County is the same as any other place in the State of Oregon. It's one who holds himself out to serve the public for those who want to engage his services.

THE COURT: This Plaintiff was carrying pea vines, is that correct?

THE WITNESS: Yes, sir.

THE COURT: Do you certificate carriers for Umatilla County?

THE WITNESS: Yes.

THE COURT: Only for Umatilla County?

THE WITNESS: Some for only Umatilla County and some for the entire State of Oregon. There's some for Multnomah County only.

THE COURT: Are there some common carriers who have unlimited certification?

THE WITNESS: Yes, sir.

THE COURT: In Umatilla County, at this time, were there any common carriers who had limited certification for pea vines?

THE WITNESS: Yes, there were.

THE COURT: There were?

THE WITNESS: Yes.

THE COURT: Can you tell us who they were and what period of time they held their certification?

MR. FABRE: Your Honor, may we cover Union County also?

THE COURT: Mr. Corey, perhaps you were going to cover these matters. But I thought I would ask Mr. Singleton these things in which I am very interested.

MR. COREY: All right.

THE WITNESS: If I might comment on Union County, I believe my reading of the permit authority of Krause is that it does not authorize any transportation from, to, or within Union County.

There is one called Fitchett Truck Lines. Their head office is in Ontario, Oregon.

THE COURT: What are they certificated for?

THE WITNESS: Insofar as Umatilla County is concerned, they are certificated for general commodity, unrestricted.

Then, there is Luisi Truck Lines, whose headquarters was in Milton-Freewater, Oregon.

Sites Silver Wheel Freightlines, their authority is unrestricted throughout the state.

Sunset Trucking Company of Pendleton, Oregon, their authority is within, from and to Umatilla County.

There is a Henry L. Campbell, who has the same authority as Sunset Trucking.

The Pendleton Brothers Transfer of Pendleton, Oregon, their authority is the same, within, from and to Umatilla County.

We have a Hermiston Transfer and Storage Company, they have general commodities without restriction within Umatilla County.

Now, those are the — I will refresh myself with these notes — those are the ones that mention Umatilla specifically.

THE COURT: All of those are unrestricted, aren't they?

THE WITNESS: With the exception of Luisi Truck Lines. They are restricted on time basis, April 1st, of each year to September 30th of each year, and within Umatilla County, and on fresh and dried peas, grain, farm equipment. I'm unable to specifically locate it now; but there are three different Luisi's permits. Some of them are specifically limited to peas, vines and peas on the vines.

THE COURT: That was in Union County?

THE WITNESS: Umatilla County.

THE COURT: Did they also have authority in Union County, or don't you know?

THE WITNESS: I'm sorry. I can't answer that for you.

THE COURT: Do you have any carriers who were limited to just pea vines?

THE WITNESS: I can't answer within any specifics.

THE COURT: People who had general authority could carry pea vines, couldn't they?

THE WITNESS: Yes, sir

THE COURT: That is unrestricted authority?

THE WITNESS: Yes.

THE COURT: Can you tell me the rate for pea vines?

THE WITNESS: No, sir.

THE COURT: Are there any rates for pea vines?

THE WITNESS: There are tariff rates for them. Tariff is quite voluminous. There are two rates, yes.

THE COURT: When you approved Krause's contract with Smith Canning and Freezing Company, did you check those tariff rates to see if the rates charged by Krause were consistent with the standards of the statute?

THE WITNESS: Those proposed to be charged by Krause, yes.

THE COURT: Go ahead.

Q (By Mr. Corey) Just one other area of inquiry, Mr. Singleton; what, in your interpretation, constitutes competition within the language of the statute which we have been concerned with here, ORS 767.420 Subsection 4?

A Historically, we consider competition to mean those common carriers possessing the operating authority to perform the service proposed to be performed by the contract carrier under consideration.

Q Those common carriers would then be deemed competition?

A Yes, sir.

. . .

CROSS - EXAMINATION

BY MR. FABRE:

. . .

Q What you have said here is your office — the

PUC has no interest of any actual competition in these areas that we are talking about?

A I don't understand what you mean. I'm not arguing; I'd like to have it cleared up.

Q Assuming that competition means actual rivalry for something, say for the business of the hauling that's involved here of Smith Canning and Freezing Company, in that sense, is your office interested or has it made any of its determinations based upon actual competition?

A We consider, sir, that any common carrier possessing the authority to do what the contract carrier proposes to do is competition. He is a common carrier and has the duty and responsibility to perform, if called upon, by any shipper, for the service — for comparable service.

Q Well, actually, are you saying that you are not interested in whether there is any actual competition between someone such as Mr. Krause or Krause, Inc. applying for the permits, as he did, to contract the hauling for Smith Canning and Freezing Company? That got a little bit involved. Do you understand what I mean by actual competition?

A I will have to put it in a little different language, perhaps, Mr. Fabre.

A common carrier is obligated, it's his responsibility and duty to serve those who call upon him for service in the area, and on the commodity which is in his authority to transport. Now, if a carrier, so qualified is requested by Smith Canning and Freezing Company to perform this service, he is obligated by law to perform the service.

Q I still would like for you to try to answer the question if you can, Mr. Singleton. Assuming that competition — now, is actual rivalry —

THE COURT: Actual what?

MR. FABRE: Rivalry for the business—

THE COURT: Don't you think you are arguing a question of law with the witness? Isn't that something for me to determine, not for Mr. Singleton to determine? He has made his position clear. He said that a common carrier who has unrestricted authority in Umatilla County is required to haul pea vines if and when Smith Canning and Freezing Company calls upon it to furnish service. He is not saying any of these trucking firms were in fact ever called upon by Smith Canning or any other growers to haul pea vines. He is just saying that under the law, they have to do it; and he regards that as competition.

MR. FABRE: Well, I think I understand very clearly that's determinative of the issue in this case, anything that he said. I would like to know just what they did.

THE COURT: He has made it pretty clear. If you understand what he said, then you can go to the next question, because I understand what he said.

MR. FABRE: Maybe the witness could answer my question, your Honor, of whether they were concerned in the PUC office with actual competition. He should be able to answer that question. Can you answer that question, Mr. Singleton?

THE COURT: Go ahead.

THE WITNESS: To determine what would be one

truck versus another truck on the highway is this what you are trying to get at?

Q (By Mr. Fabre) On actual competition.

A If this is true, then we are in no position to make a physical survey of a truck servicing — common carrier truck servicing or not servicing. Maybe you could serve it today, actual competition, I'm speaking of now, and tomorrow the common carrier would not be servicing. So, he would be without the actual competitive factor. This could change on a daily basis, to get into the actuality of the competition.

Q It would make no difference with your determination whether there was a common carrier that was in the actual business of hauling pea vines with the peas in the pods to the vinery in the field during these years that we are involved with here?

A We made no such determination that there was.

Q Well, Mr. Singleton, can't we say your office wasn't interested in actual competition?

A Definitely not.

Q That's the point I was trying to get to.

A We are interested.

Q As a matter of fact, none of these so-called common carriers that you mentioned were actually engaged in the hauling of pea vines in the years 1962 through 1965, according to your knowledge?

A I am unable to say they were. I am also unable

> to say they weren't. In other words, their reporting to us, sir, is such that I would not be knowledgeable in this. This would call for a physical inspection, either by our field staff or someone reporting to us. But, their statistical records to us do not embrace this, or do not show this to be a fact.

It is therefore submitted that the Public Utilities Commissioner correctly determined that there was competition within the contemplation of ORS 767.420(4) and correctly performed his administrative duty by prescribing the rate for the contract hauling at the approved rate, comparable to that which a common carrier would be obligated to charge upon a request for the appellee.

Appellant cites many cases defining "common carrier", many of which were decided just after the turn of the century before there was complete regulation of the motor transit industry by governmental agencies.

Even prior to statutory regulation of carriers, courts adopted definitions of a common carrier and spoke as did the U. S. Supreme Court in *U. S. v. Louisiana & P. R. Co.*, 234 U. S. 46, 34 Sup. Ct. 741 (1914), at page 746:

> It is the right of the public to use the road's facilities and to demand service of it, rather than the extent of its business, which is the real criterion determinative of its character. This principal has been frequently recognized in the decisions of the courts. We need not cite the many state cases in which it has been so held.

In *Waldum v. Lake Superior Terminal & Transfer Co.*, 169 Wis. 137, 170 N. W. 729 (1919), the court reaffirmed its definition as follows:

> A common carrier is defined as one who undertakes for hire or reward to transport the goods of such as choose to employ him from place to place.

Appellee contends that a common carrier has a duty and a right to carry public goods co-extensive with the terms of his permit authority. This subject is treated in 60 CJS § 84, p. 270, as follows:

> The services in which a certificate holder may engage, or which he is under obligation to perform, depend upon the services authorized or required by the certificate.

Cases enunciating the same rule are *Graham v. Dean*, 186 SW 2d 692 (1945), and *Colombo v. Pennsylvania Public Utility Commission*, 159 Pa. Super. 483, 48 A. 2d 59 (1946).

Graham v. Dean, supra, recites:

> A public service corporation may not operate only when the weather is pleasant or when there is a chance for profit. The obligation to serve the public is inherent in every certificate of public convenience.

ORS 767.005(5)[8] provides a statutory definition of a common carrier.

ORS 767.005(5)[9] provides a statutory presumption as to when a carrier is a common carrier.

8. See appendix p. 62
9. See appendix p. 64

Appellant seems to contend that a carrier can submit an application to the Public Utilities Commission as required by ORS 767.125, set forth his financial ability to haul, equipment to be used in the hauling, the property he proposes to haul and the territory in which his operation is to be conducted, secure his permit (most times referred to as a certificate of convenience and necessity), and then actually haul only what he chooses from the products listed in his permit.

Appellee contends that when a carrier applies for his permit, he represents, and must prove, to the Public Utilities Commission that he will haul, upon request, any of the items specified in his permit, and he further represents, and must prove, that he has the equipment to fulfill his obligation. He thus, by the application and proof to the commission, "holds himself out to the public" as ready, willing and able to haul all commodities covered in his application for permit. He does not say, "I apply for authority to haul X, Y and Z, but I am only going to haul X." In legal effect he becomes a competitor at the time his permit authority is granted.

As previously mentioned, the hauling industry is a controlled industry. Only such permitees are licensed as are necessary to meet the needs of the public. It would be absurd to license ten truckers to haul commodity X and then permit all ten to say they did not desire to haul com-

modity X because it was unprofitable or because they had inadequate equipment. The end result would necessarily be that the public would suffer, since no one else would be licensed to haul commodity X. In other words, commodity X would not get hauled.

In this connection it is important to note the words of the court in *Montgomery Ward & Co. v. Northern Pacific Terminal Co.*, 128 F. Supp. 475 (DC Or. 1953), a case in which there was an exhaustive review of the duty of common carriers, the court saying at page 490:

> The duty was a public office or trust, confirmed by the government as a franchise, accepted by the carrier voluntarily, and enforced for the public benefit.

In 60 CJS § 84b, at page 268, it is stated:

> The obligation to serve the public is inherent in every certificate of public convenience and necessity. The certificate holder must operate at the times and in the manner prescribed by the certificate, thus furnishing uniform and efficient service to the public; he may not operate only when the weather is pleasant or when there is a chance for profit.

It is important to note that the evidence failed to disclose any attempt or request by appellant for hauling service by a common carrier.

The Commissioner's Determination of Competition is Not Subject to Collateral Attack.

It is appellee's position that if the commissioner's in-

terpretation of competition under ORS 767.420(4) could be said to be incorrect, the appellant could not challenge his administrative determination because appellant was a party to the approved contract specifying the approved rate, and, if aggrieved in any way, he should and could have filed a suit against the commissioner, under the provisions of ORS 756.580[10] challenging his authority. This section provides that any party to any proceedings before the commissioner can file suit challenging any act of the commissioner. Such suit can only be filed within 90 days. Failing to do so, the appellant could not collaterally attack the commissioner's finding of competition, the remedy set forth being exclusive.

On the question of defendant's making a collateral attack on the commissioner's determination that there was competition with previously-authorized hauling by common carriers or railroads, consideration should be given to the leading case on the subject, *Steele v. General Mills*, 67 S. Ct. 439, 329 US 34 (1947), which is strikingly similar to the case at issue. In this case the contract carrier, Steele, brought action to recover established hauling rates set by the Texas Railroad Commission. The defendant shipper pleaded a secret agreement fixing rates less than the rates fixed by the commission. The shipper contended, as in the case at issue, that the commissioner was without jurisdiction to fix the rates because Texas law limited

10. See appendix p. 62

his power to fixing contract carrier rates only when there was competition with common carriers. The District Court held for the carrier; the Circuit Court held for the shipper (*General Mills v. Steele,* 5 Cir., 154 F. 2d 367), stating as follows

> The majority conclude that petitioner should not recover because the agreement to pay less than the full rate was a subterfuge, that neither party had any intention of living up to the agreement and that their conduct amounted to a fraud upon the railroad commission, contrary to good morals and that [it] tended to interfere with the purity of the administration of the law, such as puts both parties in pari delicto with no right to seek advantage of recovery * * * on the 'spurious' contract. The dissenting judge did not agree that the records showed a deliberate purpose to evade the statutes. He further thought that under controlling Texas law and policy the doctrine of pari delicto could not be applied so as to have the goods of a Texas shipper hauled in Texas at a less rate than the others were compelled to pay by law. All the judges agreed, however, that the agreement to pay less than the Commissioner-fixed rates was void.

The United States Supreme Court, however, held:

> Nor can we say that the District Court and the Circuit Court of Appeals erred in interpreting Texas law to render the supplemental agreement between the petitioner and respondent designed to circumvent payment of Commission-fixed rates void and unenforceable. The District Court's holdings that the Commission's rate fixing orders applied to petitioner's business, that they were not subject under Texas law to the collateral attack here made, and that petitioner could not carry respondent's goods at less than the rates fixed were well buttressed by state statutes and

> court decisions. No argument here made by respondent or state decisions on which it relies refute the District Court's reasoning or conclusion.

See also *W. S. Dickey Manufacturing Company v. Corder,* 310 F. 2d 764 (1964), citing *Steele v. General Mills, supra. Oil Field Haulers Assn., Inc. v. Railroad Commission,* 381 SW 2d 183.

The case of *Butcher v. Flagg,* 185 Or. 471, 203 P. 2d 651 (1949), was a direct statutory proceeding against the Oregon Public Utility Commissioner, and, even there, where the attack on the commissioner's determination was not collateral, as it is here, the court says:

> (2) By Sec. 133-502 authority is conferred upon the commissioner to determine whether permission shall be granted to construct a highway across the track of a railroad company at grade. Determination of this matter is a legislative or an administrative question. *Warren v. Bean,* 167 Or. 116, 125, 115 P. 2d 167; *Pacific Tel. and Tel. Company v. Wallace,* 158 Or. 210, 220, 75 P. 2d 942; *Pierce Auto Freight Lines, Inc. v. Flagg,* 177 Or. 1, 38, 159 P. 2d 162. In *Warren v. Bean, supra,* this court quoted with approval the following excerpts from *St. Joseph Stock Yards Co. v. United States,* 298 U. S. 38, 51, 556 S. Ct. 720, 725, 80 L. Ed. 1033:
>
> ". . . The court does not sit as a board of revision to substitute its judgment for that of the Legislature or its agents as to matters within the province of either. [Citing authorities.] When the Legislature itself acts within the broad field of legislative discretion, its determinations are conclusive. When the Legislature appoints an agent to act within that sphere of legislative authority, it may endow the agent with power to

> make findings of fact which are conclusive provided the requirements of due process which are specially applicable to such an agency are met, as in according a fair hearing and acting upon evidence and not arbitrarily. [Citing authorities.] In such cases the judicial inquiry into the facts goes no further than to ascertain whether there is evidence to support the findings, and the question of the weight of the evidence in determining issues of fact lies with the legislative agency acting within its statutory authority."

Thus, it will be seen that the only limiting qualification of the commissioner's determination is the "due process" compliance. Here, there is no due process problem because the hauling contracts were executed for the avowed purpose of submission of the same to the commissioner. The agreement of the parties being thus evidenced to the commissioner, no hearing or formal order is required, and neither of the contracting parties can now complain of the lack thereof.

The case of *Warren v. Bean*, 167 Or. 116, 115 P. 2d 167, a carrier case in which another direct proceeding against the commissioner came before the Oregon Supreme Court for review, was decided upon the question of the court's authority to review an administrative determination of the commissioner. There, the court said:

> The determination of whether a permit shall be granted or refused is a legislative or administrative question and not a judicial question. Courts do not have *jurisdiction* to determine legislative or administrative questions and they can no more exercise that

> function than the commissioner can exercise judicial functions. (Emphasis supplied.)

In the case of *Callanan Road Improvement Co. v. U. S.*, 345 U. S. 507, 73 S. Ct. 803 (1953), the following facts were considered.

Prior to 1943 Hutton operated a freight boat and barges, and in a "grandfather" proceeding was granted authority for self-propelled vessels, but not for barges. He operated under this authority until 1944, as he had before, using both the boat and barges. The commission on its own motion reconsidered his original application and limited the authority to his use of the boat only. He died several months later and Callanan Road Improvement Co. acquired his authority. In 1951 Callanan filed a petition for interpretation of the authority in an amended certificate (1944), claiming right to towing service and that the limitation imposed on Hutton in 1944 was unauthorized. The commissioner held against Callanan, and Callanan appealed to a three-man U. S. District Court, which refused to set aside the commissioner's order. This appeal to the U. S. Supreme Court followed:

> . . . The appellant cannot now raise the question of the power of the Commission to modify the original certificate of July 17, 1942, by the limitations contained in the order of March 7, 1944. Whether the Commission's action in reopening the 1942 proceedings and placing the limitations on the certificate theretofore issued was right or wrong, the jurisdic-

tion of the Commission was not destroyed thereby. A direct attack in such circumstances was the remedy.

(2.3) Hutton not only did not object. He accepted the modified certificate and operated under it, just as he had always operated. His operation was not cut down by the limitations placed upon the certificate. The appellant, as transferee of that modified certificate, stands in no better position than Hutton stood. *Cf. Gregg Cartage & Storage Co. v. United States,* 316 U. S. 74, 82-83, 62 S. Ct. 932, 936, 86 L. Ed. 1283. Indeed, in the 1947 transfer proceedings before the Commission when the appellant sought to acquire Hutton's amended certificate of March 7, 1944, the appellant objected that the protestant there could not raise the question of the Commission's power to modify the certificate, as this would be a collateral attack on the Commission's order. That is exactly what the appellant seeks to do here. It cannot in this collateral proceeding attack the validity of the Commission's order of March 7, 1944. *Securities & Exchange Comm v. Central - Illinois Sec. Corp.*, 338 U. S. 96, 143, 69 S. Ct. 1377, 1401, 93 L. Ed.; *Stanley v. Supervisors,* 121 U. S. 535, 550, 7 S. Ct. 1234, 1239, 30 L. Ed. 1000; *Reconstruction Finance Corp. v. Lightsey,* 4 Cir., 185 F. 2d 167; *City of Tulsa v. Midland Valley R. Co.*, 10 Cir., 168 F. 2d 252, 254; *Brown County v. Atlantic Pipe Line*, 5 Cir., 91 F. 2d 394, 398. The appellant must take the certificate as it stood at the time it sought and received the Commission's approval for its transfer.

(4) Furthermore, the appellant, having invoked the power of the Commission to approve the transfer of the amended certificate to it, is now estopped to deny the Commission's power to issue the certificate in its present form and as it existed prior to the time the appellant sought its transfer. *United Fuel Gas Co. v. Railroad Comm.*, 278 U. S. 300, 307-308, 49 S. Ct. 150, 151, 152, 73 L. Ed. 390; *St. Louis Malle-*

> *able Casting Co. v. George C. Prendergast Construction Co.*, 260 U. S. 469, 43 S. Ct. 178, 67 L. Ed. 351, This is especially true in view of the appellant's contention at the 1947 transfer hearing that the protestant in that hearing could not raise the question there which the appellant seeks to raise here, as it would constitute a collateral attack on the order of the Commission. The appellant cannot blow hot and cold and take now a position contrary to that taken in the proceedings it invoked to obtain the Commission's approval.

The *Callanan* case, cited herein, is the leading case on the question of a collateral attack being made against an administrative decision. It is submitted that it is a controlling decision in this case.

In *Snipes v. U.* S., 230 F. 2d 165 (1956), there was a petition by the Commissioner of Internal Revenue to seek review of a decision of the tax court that the War Production Board had no authority to issue partial certificates of necessity, and that the taxpayer was entitled to amortization of the entire costs of such facilities governed by such certificates. The evidence disclosed that the taxpayer had accepted the administrative decision of the War Production Board and had accepted the benefits and had amortized the emergency facilities constructed during World War II. The court held that where the taxpayer has accepted benefits from the administrative decision, he forfeited his right to challenge the War Pro-

duction Board's authority. The court then cites from *Callanan, supra,* the quotation being from page 806:

> (4) Furthermore, the appellant, having invoked the power of the Commission to approve the transfer of the amended certificate to it, it is now estopped to deny the Commission's power to issue the certificate in its present form and as it existed prior to the time the appellant sought its transfer.

The court further observed that the appropriate method was a direct attack by mandamus, rather than to attempt to attack the authority of the War Production Board collaterally.

In the case of *Admiral Towing v. Woolen,* 290 F. 2d 644 (1961), wherein the court gave consideration to a federal statute that the owner of a ship could petition to limit his liability arising out of loss of the ship, the court observed that the owner had originally sought to come under the statute. In the instant proceedings, he took a contrary position and again the court held that the owner was estopped from following such a course, again quoting from the *Callanan* case:

> . . . The appellant cannot blow hot and cold and now take a position contrary to that taken in the proceedings it invoked to obtain the Commission's approval. If appellant then had taken the position it seeks now, the Commission might conceivably have refused its approval of the transfer.

The *Callanan* case was again considered in the case

of *Kroblinen Refrigerated Xpress v. U. S.*, 197 F. Supp. 44 (1961). The case involved a question of whether the word "groceries" included "fresh meats". The I. C. C. said that it did not. Action was then instituted by the carrier to set aside the order of the I. C. C. The court said at page 44, citing the *Callanan* case:

> . . . Such a contention is no answer to the present charge of permit violation, since the permit cannot be collaterally attacked.

The Public Utilities Commissioner Having Established the Hauling Rate, There Can Be No Defense to Nonpayment Thereof.

There are many federal cases which announce and explain the rule. The leading federal case is *Louisville & Nashville Railroad Company v. Maxwell*, 237 U. S. 94, 35 S. Ct. 494, 59 L. Ed. 853 (1915) wherein the court stated:

> Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination . . .
>
> . . . As was said in *Kansas City Southern Railway*

Company v. Carl, 227 U. S. 639, 653; 57 L. Ed. 683, 688; 33 Sup. Ct. Rep. 391,

> "Neither the intentional nor accidental misstatement of the applicable published rate will bind the carrier or shipper. The lawful rate is that which the carrier must exact and that which the shipper must pay. The shipper's knowledge of the lawful rate is conclusively presumed . . ."

It is important to note the similarity between the federal statute and the Oregon statute on the absolute prohibition against variation from established rates. 49 USCA 317 reads as follows:

> (b) No common carrier by motor vehicle shall charge or demand or collect or receive a greater or less or different compensation for transportation or for any service in connection therewith between the points enumerated in such tariff and the rates, fares and charges specified in the tariffs in effect at the time; and no carrier shall refund or remit in any manner or by any device, directly or indirectly, or through any agent or broker or otherwise, any portion of the rates, fares or charges so specified, or extend to any person any privilege or facilities for transportation in interstate or foreign commerce, except such as are specified in its tariffs . . .

ORS 767.410 (2) recites:

> (2) No common carrier or forwarder shall:
>
> (a) Charge, demand, collect or receive a greater, less or different remuneration for the transportation of passengers or property, or both, or for any service in connection therewith, than the rates, fares and

charges which have been legally established and filed with the commissioner.

(b) Refund or remit in any manner or by any device any portion of the rates, fares and charges required to be collected by its tariffs on file with the commissioner.

Under federal law shippers and consignees dealing with common carriers subject to the Interstate Commerce Act have an absolute obligation to pay the duly-filed and published tariff rates. This was established by the United States Supreme Court in *Gulf, Colorado and Santa Fe Railway Company v. Hefley,* 158 U. S. 98, 15 S. Ct. 802, 39 L. Ed. 910 (1895), and *Texas and Pacific Railway Company v. Mugg,* 202 U. S. 242, 26 S. Ct. 628, 50 L. Ed. 1011 (1905). The rule has been rigorously followed ever since. *Illinois Central Railroad Company v. Henderson Elevator Company,* 226 U. S. 441, 335 S. Ct. 176, 57 L. Ed. 290 (1913); *Louisville & Nashville Railroad Company v. Maxwell,* 237 U. S. 94, 35 S. Ct. 494, 59 L. Ed. 853 (1915); *Western Transit Company v. A. C. Leslie & Company, Ltd.,* 242 U. S. 448, 37 S. Ct. 133, 61 L. Ed. 423 (1917); *Pittsburgh, C. C. & St. L. R. Co. v. Fink,* 250 U. S. 577, 40 S. Ct. 27, 63 L. Ed. 1151 (1919); *New York Central R. Co. v. York & Whitney Co.,* 256 U. S. 406, 41 S. Ct. 509, 65 L. Ed. 1016 (1920);*Louisville & Nashville Railroad Company v. Central Iron & Coal Company,* 265 U.S. 59, 44 S. Ct. 441, 68 L. Ed. 900 (1924);

Turner, Dennis & Lowry Lumber Company v. Chicago, Milwaukee & St. Paul Railway Co., 271 U. S. 259, 46 S. Ct. 530, 70 L. Ed. 934 (1926); *Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U. S. 516, 59 S. Ct. 612, 83 L. Ed. 953 (1939).

It was said in *Chicago & Alton Railroad Company v. Kirby*, 225 U. S. 155, 32 S. Ct. 648, 56 L. Ed. 1033 (1912), that a shipper is presumed to know the published rates. Similar language appears in many subsequent decisions. *Kansas City Southern Railway Company v. Carl*, 227 U. S. 639, 33 S. Ct. 391, 57 L. Ed. 683 (1913); *Boston and Maine Railroad v. Hooker*, 233 U. S. 97, 34 S. Ct. 526, 58 L. Ed. 868 (1914).

In addition to repeated holdings of the United States Supreme Court, the rule that a shipper cannot avoid paying the tariff rate has been recognized by many other federal authorities as well as by the courts of more than 25 states. The decisions are collected in an annotation, "Carrier's right or liability in respect of excess of lawful charge over charge understated where discrimination is forbidden," 83 ALR 245, supplemented in 88 ALR 2d 1375 at page 1378.

Misquotation of rates by the carrier's agent is no defense to an action for undercharges. *Texas and Pacific Railway Company v. Mugg, supra; Kansas City Southern Railway Company v. Carl, supra; Louisville & Nashville*

Railroad Co. v. Maxwell, supra; Pittsburgh, C. C. & St. L. R. Co. v. Fink, supra; Louisville & Nashville Railroad Company v. Central Iron & Coal Company, supra.

It must be emphasized a carrier's contract to ship for less than the tariff rate is not a defense. *Gulf, Colorado and Santa Fe Railway Company v. Hefley, supra; New York Central & Hudson River R. Co. v. York & Whitney Co., supra; Louisville & Nashville R. Co. v. Central Iron & Coal Company, supra; Chicago & Alton Railroad Company v. Kirby, supra.*

Even the carrier's fraud is no defense. In *Kansas City Southern Railway Company v. Carl, supra,* it was said: "Neither the intentional nor accidental misstatement of the applicable published rate will bind the carrier or shipper." This language was quoted with approval in *Louisville & Nashville R. Co. v. Maxwell, supra. Herminghausen v. Adams Express Co.,* 167 Iowa 230, 149 NW 234 (1914) indicated that allegations of fraud and deceit by a shipper in his action against an interstate carrier for loss suffered by misquotation of rates would be demurrable. In *F. Burkhart Mfg. Co. v. Fort Worth & D. C. Ry. Co.,* 149 F. 2d 909 (8th Circ. 1945), a carrier was allowed to recover undercharges from the innocent endorsee of bills of lading, even though such undercharges were made as part of a conspiracy between the carrier and the consignor-consignee.

A carrier's action for undercharges cannot be resisted on grounds of estoppel. *Pittsburgh, C. C. & St. L. R. Co. v. Fink, supra; Louisville & Nashville R. Co. v. Central Iron & Coal Co., spura; Union Pacific Railroad Company v. Corneli Seed Company,* 161 F. Supp. 52 (DC SD Idaho, 1958); *Bernstein Bros. Pipe & Machinery Co. v. Denver & R.G.W.R. Co.,* 193 F. 2d 441 (CA Colo., 1951); *Christensen v. Northern Pac. Ry. Co.,* 184 F. 2d 534 (CA N. D. 1950); *Petroleum Co. v. Sinclair Pipeline Co.,* 282 F. 2d 913 (CA Colo. 1960); *United States v. Garner,* 134 F. Supp. 16 (DC N. Y. 1955); *Hughes Transp. v. United States,* 121 F. Supp. 212 (Ct. Cl. 1954); *Union Transfer Co. v. Renstrom,* 151 Neb. 326, 37 NW 2d 383 (1949). See also 83 ALR 245, 257.

In the case of *McFadden v. Alabama Great Southern Railroad Company,* 241 F. 562 (1917), the court considered and disposed of the questions of fraud, intent, mistake, contract rights, notice to shippers of rates and public policy as follows:

> In approaching this question [which tariff to apply] we lay aside all considerations of conduct, intention, mistake and misunderstanding respecting the rate paid, for the law is very well settled that the Act to Regulate Commerce demands not only that the carrier shall charge but that the shipper shall pay the legal rate. The contract between carrier and shipper is no longer a contract as to rate; it is merely a contract that the carrier will render transportation service when the shipper pays the legal rate. When

> the transportation is interstate, the interstate rate is the legal rate, and that rate must be demanded and paid, for both the carrier and shipper are charged with notice of it; and if a lesser rate is charged and paid, intentionally or innocently, recovery must be had against the shipper for the difference, in order that the policy of the law against unjust discrimination may be carried out. *L. & N. R. R. Co. v. Maxwell,* 237 U.S. 94, 35 Sup. Ct. 494, 59 L. Ed. 853, L R A 1915 E, 665; . . .

Also, the District Court in *Atchison, Topeka & Santa Fe Railroad Company v. Judson Freight Forwarding Company, 79 F. Supp.* 789 (1943), was confronted with an unusual problem. The carrier had a provision in its tariff that if a shipper ordered a 50-foot car, it could substitute at its own convenience two 40-foot cars. There were 105 separate shipments involved. The court first found that if the carrier in good faith made the substitution, that action could not later be re-examined. It then found as a fact that the shipper would order a 50-foot car, but in doing so understood that the carrier would in fact supply two 40-foot cars. Faced with this situation, the court held:

> All practices, schemes or devices whatsoever that run counter to those sections [49 USCA § 2, 3(1), 6(7) and 20(7)] are prohibited. All shippers are supposed to be on equal terms. Concessions, preferences, advantages and rebates counter to the fixed rates duly posted and published are now prohibited and are measured by results. The courts are charged with the duty of cutting through subterfuge and pretense, getting at the very roots of every form of discrimination . . .

> Under shippers' contention an illegal contract in the form of a bill of lading would be absolutely binding, and the court would be helpless in attempting to ascertain the truth. Such argument falls under its own weight. Evidence is admissible to show that an agreement legal on its face was in fact an illegal transaction . . .
>
> Inasmuch as the contract between the parties was in violation of law and contrary to public policy, it was a nullity and not binding on either party. Freight charges are fixed by the tariff rate and in effect fixed by law, and any bill of lading that attempts to fix a rate contrary to the legal rate is ineffectual.

The court then quotes from the 1917 *McFadden* case the same language we have quoted from that case and goes on to point out that the "cardinal purpose of the provisions for the public establishment of tariff rates is to secure uniformity, reasonableness and certainty of charges for services." Further, the court pointed out that the tariff is the rate imposed by law; private contract cannot subvert tariff rates and is void if different than tariff rates, that not only are private litigants involved, but public policy; and that the carrier has a *duty* to sue for the undercharges.

National Carloading Corp. v. Atchison, T. & S. F. Ry. Co., 150 F. 2d 210 (1945), is the appeal of the *Judson* case. In affirming the District Court it is held that "Conduct, intention, mistake and misunderstanding are no de-

fense," citing the *McFadden* case above as authority. Significantly, the court held:

> . . . It is well established that the acts of the parties herein affect not only themselves, but also the welfare of the public.

Atchison, T. & S. F. Ry. Co. v. White, 49 F. Supp. 797 (1943) was decided the same day and by the same court as the *Judson* case above-cited, with substantially the same facts in issue. The court reaches the same conclusion, naturally enough, and, like the *Judson* case, was affirmed on appeal. *White v. Atchison, T. & S. F. Ry. Co.,* 149 F. 2d 919 (1945). The District Court did, however, take the opportunity to expand on the *Judson* opinion, pointing out that:

> The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier . . . And they are not affected by the tort of a third party.
>
> In the recent case of *Union Pacific Railroad Company v. United States,* 313 U. S. 450-462, 61 S. Ct., 1064, 1971, 85 L. Ed. 1453, the Court through Mr. Justice Reed, said "Violation of the commerce acts through receipt of advantages is to be tested by actual results not by intention . . . In fact, favoritism which destroys equality between shippers, however, brought about, is not tolerated."

The opinion also cited the Brandeis opinion in *Louisville & N. R. Co. v. Central Iron & Coal Co., supra* on the principle that rates which are fixed by law cannot be varied

by contract and that the acts and omissions of a carrier could not give rise to estoppel.

Finally, it declared:

> Tariff provisions have the force and effect of a statute and cannot be deviated from under any circumstances. *Penn. Railroad Company v. International Coal Mining Co.*, 230 U. S. 184, 33 S. Ct. 893, 57 L. Ed. 1446; *Louisville & Nashville Railroad Company v. Maxwell*, 237 U. S. 94, 35 S. Ct. 494, 59 L. Ed. 853, LRA 1915E, 665; *Baldwin v. Scott County Milling Co.*, 307 U.S. 478, 59 S. Ct. 943, 83 L. Ed. 1409; 13 CJS, Carriers, § 393, pp. 837-876; *Button v. Atchison, Topeka & Santa Fe Railway Co.*, 8 Cir., 1 F. 2d 709.

One of the more unusual undercharge cases is *Fort Worth & D. C. Ry. Co. v. F. Burkhart Mfg. Co.*, 56 F. Supp. 159 (1944). The unusual aspects were that the carrier was suing the consignee for the undercharge, a number of the carrier's employees already having been convicted on misdemeanor counts in connection with the shipments, and the shipper having been convicted of a felony in connection therewith, all convictions being for conspiracy to violate the law by "causing the shipment in question to be transported at a rate less than that required by law." On the other hand, the defendant in the case was innocent of wrongdoing and had no knowledge of the conspiracy.

Fraud and estoppel were pleaded in defense to the complaint. The court held, quoting from another case:

> The railroad, suing in its interest, alone, might be estopped; but in suing under the statute, it is suing as a trustee for the protection of the public. The public, in whose interest, as well as its own, the carrier has a lien on the undelivered freight for the full rate, is not estopped, because it did not so act and made no representation on which the consignee relied, and, when the consignee accepted the goods, it deprived the public of that lien. It follows that the consignee, because of such act, still remains liable to the carrier, who sues in the publics' interest for the value of the right destroyed.

There is sound reason for this public policy which is at times perhaps rather severe. The court, quoting from yet another case, gave one of those reasons as follows:

> . . . Collusion between the carrier and a shipper, which it desired to favor, for protection of other than the tariff rates, would be rendered too easy of accomplishment. In such case the carrier could protect any rate which it might desire to apply by simply quoting it to the favored shipper, and thus the integrity of the published tariffs (a strict observance of what is required by law in order to prevent unjust discrimination) would be constantly violated.

The most recent case of which we are aware is *Minton v. General Shale Products Corp.*, decided in the Tennessee Court of Appeals, Eastern Section, December 4, 1962, 15 Federal Carriers Cases, paragraph 81, 507, holding that the defense of estoppel is not available to a shipper to defeat its liability for payment of charges due for the transporting of its products under a contract and

schedule of minimum rates or charges filed with, and approved by, the Interstate Commerce Commission.

There are four Oregon decisions which recognize and apply the federal rule in cases involving interstate shipments, and it is submitted that they certainly set forth and adopt the reasoning of the many federal cases cited herein. *Baldwin Land Co. v. Columbia Ry. Co.*, 58 Or. 285, 114 P. 469 (1911); *Zoller Hop Co. v. Southern Pacific Co.*, 72 Or. 262, 143 P. 931 (1914); *Black v. Southern Pacific Co.*, 88 Or. 533, 171 P. 878 (1918); and *Oregon-Washington R. & N. Co. v. Cascade Contract Co.*, 101 Or. 582, 197 P. 1085 (1921). In the *Baldwin* case the court stated:

> If the rate quoted is less than the schedule rate approved by the Interstate Commerce Commission and published, the shipper is liable for the full rate, whether he actually knows that the rate quoted is less than the schedule rate or not.

In *Zoller Hop Co. v. Southern Pacific Co., supra*, the court said:

> Where the law had provided authentic and conclusive means of knowledge, a shipper cannot close his eyes and ears to official information, and be heard to say he did not know, and hence was defrauded.

Black v. Southern Pacific Co., supra, the court found:

> Neither the shipper nor the carrier is bound by the rate actually paid because the shipments are neces-

> sarily controlled and governed by whichever published rate is applicable to the shipment.

In *Oregon-Washington R. & N. Co. v. Cascade Contract Co., supra,* the court said:

> The defendant was bound to know the existing tariff. It was charged with knowledge that the plaintiff could not charge less or more than, or any rate different from that prescribed in the current schedule.

In addition to the cited Oregon cases, consideration should be given to the historical development of the Oregon statute law in this area, which demonstrates that not only has the Supreme Court of the state of Oregon followed the interpretation of the federal courts, but that the historical development of the Oregon statute law is patterned after the federal statutes.

ORS 767.410, which regulates intrastate motor carrier rates, is closely modeled after comparable provisions of the Interstate Commerce Act. Subsections (1)(a) and (2)(a) and (b), are similar to 49 USCA 6 (1) and 6 (7) (Part I of the Interstate Commerce Act, regulating rail carriers); to 49 USCA 317(a) and (b), set forth above, (Part II of the Interstate Commerce Act, regulating motor carriers); to 49 USCA 906 (a) and (c) (Part III of the Interstate Commerce Act, regulating water carriers); and to 49 USCA 1005 (a) and (c) (Part IV of the Interstate Commerce Act regulating freight forwarders). Part I of

the Interstate Commerce Act was enacted in 1877. Feb. 4, 1877, c. 104, 24 Stat. 379. Part II was added in 1935, Aug. 9, 1935, c. 498, 49 Stat. 543; Part III in 1940, Sept. 18, 1940 c. 722, Title II § 201, 54 Stat. 929; and Part IV in 1942, May 16, 1942, c. 318, § 1, 56 Stat. 284.

The Oregon code regulating motor carriage, now ORS Chapter 767, has many times been revised. Provisions similar to those of ORS 767.410(1)(a) and (2)(a) and (b) were first enacted in 1925. Or. L. 1925, ch. 380 secs. 23 and 26; OC 55-1323, 55-1326. Subsequent revisions and re-enactments of ORS 767.410 are as follow: Or. L. 1933, ch. 429 § 6 p. 753; Or. L. 1933 (2d S. S.), ch. 45 § 5 p. 134; Or. L. 1935, ch. 415 § 4, p. 692; O C (1935 Suppl.) 55-1346; Or. L. 1939, ch. 523, § 3 p. 1101; Or. L. 1947, c. 467 § 6; OCLA (s) 115-5a06; Or. L. 1949, c. 448 § 3; Or. L. 1961, c. 548 § 1.

Possibly, the 1925 act was modeled upon the Oregon Railroad Commission Act, Or. L. 1907, c. 53 (LOL 6875 et seq.) rather than directly upon the Interstate Commerce Act, although the Railroad Commisson Act was itself based in large part upon the federal act.

The fact of controlling significance is, however, that when Oregon enacted its motor carrier code in 1925, federal laws very similar in wording to ORS 767.410 (1) and (2) (a) and (b) had already received the well-settled interpretation which has been discussed in this brief. As pre-

viously stated, in addition to many decisions of United States courts and courts of other states, the Oregon Supreme Court had spoken four times upon the subject. If the Oregon legislature intended that some rule other than the federal rule should apply in this state, it is inconceivable that it would have followed the wording of federal acts so closely both in the 1925 act and subsequent revisions without adding some qualifying provisions.

It is important to note that affirmance of the judgment for the appellee would not subject the appellant to any unfairness or discrimination because, by any interpretation, it would only be paying now what the law required it to pay when the services were rendered, and, more particularly, it is only paying now what it would have had to pay a common carrier who performed the same service that appellee performed.

The Parol Evidence Rule Bans Oral Evidence Denying the Validity of a Written Contract Executed with the Intent of Misleading a Third Party.

ORS 41.740:

> Parol Evidence Rule. When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be, between the parties and their representatives or successors in interest, no evidence of the terms of the agreement, other than the con-

> tents of the writing, except where a mistake or imperfection of the writing is put in issue by the pleadings or where the validity of the agreement is the fact in dispute. However, this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in ORS 42.220, or to explain an ambiguity intrinsic or extrinsic, or to establish illegality or fraud. The term "agreement" includes deeds and wills as well as contracts between parties.

Appellant contends that the trial court erred in ruling inadmissible under ORS 41.740 the testimony of Mr. Stoddard that the written contracts that were filed with the Public Utility Commissioner were not the true contracts of the parties and that the true contract was an oral agreement that it is claimed has been fully paid and performed.

However, the rule adopted by Judge Solomon is clearly in accord with the current and controlling law of Oregon, albeit the minority view on the subject. This rule is succinctly stated in *Kergil v. Central Oregon Fir Supply Co.*, 213 Or. 168, 189, 323 P. 2d 947, 948 (1958), a case that is squarely on all fours with the instant case, and one in which the Oregon Supreme Court reviewed both the majority and minority views before announcing through its Chief Justice which view should prevail in Oregon.

> The defendant having admitted the execution of the written lease agreements, and seeking to avoid their effect solely on the basis of the fact that they are pretended and sham, thus admits that, if the leases

are valid and do set forth the consideration for the use of the equipment of the plaintiff, any attempt to offer oral evidence of a different consideration for their use would violate the parol evidence rule set forth in ORS 41.740. *Biersdorf v. Putnam*, 181 Or. 522, 182 P. 2d 992; *Coker & Bellamy v. Richey*, 104 Or. 14, 202 P. 551, 204 P. 945, 204 P. 947, 22 ALR 744; *Muir v. Morris*, 80 Or. 378, 154 P. 117, 157 P. 785.

Therefore, the sole basis of the defendant's defense, simply stated, is the plaintiff and defendant did not intend to create a valid lease agreement in writing for the use of plaintiff's equipment, but entered into these leases for the purpose of avoiding the payment of certain taxes which would be due and owing if the defendant engaged the plaintiff to transport its lumber as a contract carrier.

. . .

Thus, the principal question is: Will the law permit consideration of oral evidence denying the validity of the written memorial of the parties when such oral evidence shows the written document was executed for the purpose of defrauding or misleading a third party?

The courts are not of a single mind upon this issue. We confess, the majority of jurisdictions at the present time, based upon pure logic, admit the evidence on the basis that such testimony is offered, not to vary the terms of the written instrument within the letter of the parole evidence rule, but only to show the parties never intended the written instrument to be a binding agreement.

The difficulty with this view is that it overlooks the moral aspects of the situation. It pemits the law to be used to lend its aid to those who would mislead

or defraud third parties without providing any restraining penalty upon their immoral actions. Of the majority view, the eminent Michigan law professor John E. Tracy, 33 Michigan Law Review 411 (1934-35), speaks thus:

> "A rule admitting such testimony encourages dishonest men in pursuing fradulent practices. If such a man knows that he can, to his profit, with little risk to himself, deceive his neighbor by arranging to have exhibited to such neighbor a contract apparently binding but legally unenforceable, can it not be expected that he will do so? Also, would it not be equally apparent to the layman that a dishonest man, faced with certain liability on a contract which he has signed, under such a rule could always create for himself a chance of avoiding such liability by inventing testimony to show that he signed the contract only for the purpose of deceiving someone not a party to the cause? For, under the rule as laid down by the authorities, against such testimony, if believed by the jury, the court is powerless to do justice, however preposterous the court may feel it to be."

And Professor Wigmore, 9 Wigmore on Evidence 16, §2406, states the following:

> "When the document is to serve the purpose of a mere *sham*, this principle in strictness exonerates the makers. But a just policy would seem to concede this only when the pretence is a morally justifiable one (As, to calm a lunatic or to console a dying person). When it is *morally beyond sanction*, or aims at an *evasion of the law* or a deception of other persons, by intent of the parties, that intention will not be given effect. Hence, if the *validity* of the instrument would

> give effect to such intention (as in usury), the instrument will not be enforced; *but if the invalidity of the instrument would give effect to such intention, the instrument will be enforced.* (Emphasis supplied.)

At an early date the Supreme Court of Pennsylvania considered this issue in the case of *Evans v. Dravo*, 24 Pa. 62, 62 Am. Dec. 359. In that case the plaintiff owned property sought by one Gilpin as a site for a mill. While the property was of a value of $2,500, plaintiff sold to Gilpin for $500, with bond attached signed by other parties to pay plaintiff $2,000. When these parties were sued they testified they were not to be held liable on the bond since the only reason for its existence was that plaintiff had to have it to persuade his wife to join him in the deed. The Supreme Court held the evidence should never have been admitted, saying on page 67:

> ". . . If a plaintiff, who has been party to a fraud, has, in order to show consideration, or for other purposes of his action, to go beyond the instrument sued on, and unravel the transaction on which it was founded, he cannot have the assistance of Courts, either of equity or law, where the defendant has given the plaintiff perfect cause of action, by an instrument unimpeachable in itself, Courts are bound to sustain it, because they are not at liberty to presume it fraudulent, and the law forbids a confederate to prove it fraudulent. The rule is calculated to make men honest in their dealings, not only as between themselves, but in respect to the absent, the dependent, and the ignorant, and we think this a fitting case to which to apply it."

Later, in *Hendrickson v. Evans*, 25 Pa. 441, the court was asked to overrule this decision upon the

same facts and in sustaining its prior ruling on page 444 said:

> "The plaintiff was then and is now in possession of a legal and valid cause of action . . . But the defendant alleges an equity which ought to restrain him, and, to make it out, is obliged to show the fraudulent transaction. In respect to that matter, the real substance of the dispute, he is the actor. He alleges and proves the fraud. This the maxim forbids him to do . . . As to the equity relied on by him he is plaintiff in fact, whatever the forum or the position of the parties on the record."

Other courts have adopted this rule which we believe is the one most in conformity with the dictates of justice. See *Graham v. Savage,* 110 Minn. 510, 126 NW 394; *Higby v. Hooper,* 124 Mont. 331, 221 P. 2d 1043; *Supreme Lodge Knights of Pythias v. Dalzell,* 205 Mo. App. 207, 223 SW 786; *Gagnon v. Fleury,* 117 Vt. 382, 92 A. 2d 470; *Town of Grand Isle v. Kinney,* 70 Vt. 381, 41 A. 130. See dissent in *Hoss v. Purinton,* 9 Cir., 229 F. 2d 104.

Under the facts in this case, the trial court erred in admitting testimony of another and different oral contract from that expressed by the parties in their executed written leases.

The *Kergil* case clearly states the controlling rule and is not distinguishable from the instant case. These two cases are strikingly similar as to both facts and claimed defenses to the written memorials of the parties.

The rule of the *Kergil* case again came before the Supreme Court of Oregon for review five years later in

Mock v. Bell Motors, Inc., 234 Or. 224, 380 P. 2d 992 (1963). There, the court in a three-paragraph per curiam opinion, citing *Kergil*, held that a written contract for the purchase of an automobile sales business could not be set aside on the ground that the written agreement was not the actual contract and that the sale was governed by an oral agreement which was materially different, and that the written contract was executed solely for the purpose of obtaining the acquiescence of the automobile manufacturer for the sale. The *Mock* case decided only this one question and no other, categorically reaffirming the rule of *Kergil*.

Again the parol evidence issue came before the Oregon court, en banc, in the recent case of *Carolina Casualty Insurance Co. v. Oregon Auto Insurance Co.*, 242 Or. 407, 408 P. 2d 198 (1965). There, the parties entered into a written truck lease, to evade I. C. C. regulations, and the carrier continued to control and operate the trucks. A serious accident occurred involving one of the trucks in question and an issue developed as to whether the shipper's co-insurer was liable for a resulting personal injury settlement loss. The shipper's co-insurer claimed nonliability to contribute to the personal injury settlement on the ground that the written lease was a sham and not the true agreement.

The court, reaffirming its adoption of the minority rule as expressed in *Kergil* and *Mock* states:

> We have been unable to find any Oregon decisions discussing the law where there is no morally reprehensible purpose to be accomplished by a writing not intended to have legal effect. However, Oregon does not follow the weight of authority where the purpose sought to be accomplished by such a writing is morally objectionable. *We follow the minority rule which says that where a written contract was entered into to accomplish a morally objectionable purpose, parol evidence that the writing was a sham will not be received.* Otherwise, a court is used to aid those who would mislead or defraud third parties. (408 P. 2d 201, emphasis supplied.)

A lengthy review of the facts and rationale of the *Kergil* case is then set forth, followed by a reiteration of the purpose of the Oregon rule.

> The purpose of the*Kergil* rule is to act as a deterrent to sham contracts entered into with a morally objectionable *intent to mislead* third parties. (Emphasis supplied.)

The court concluded that the trial court erred in admitting parol evidence that the lease contract was a sham and not intended to create any legal relationship between the parties, and, therefore, reversed.

In Consolidated Ranches, Inc. v. Chase Land and Cattle Co., 408 P. 2d 203 (1965), the Oregon court, again en banc, states at page 205:

> Turning to the more troublesome issue of parol

> evidence, and the proof of the actual agreement, it must be kept in mind that the parol-evidence rule functions to keep the parties to an integrated writing, and their privies, if they later become adversaries, from denying or changing the terms of their writing.

Other states having adopted the same reasoning as the *Kergil* case and Professor Wigmore are Minnesota, Montana, Pennsylvania and Vermont. They were recently joined by Iowa in 1966 in the case of *Schnabel v. Vaughn,* 140 NW 2d 168. This case concerned the execution of a second lease of certain business premises for the sole purpose of providing evidence that the lessee could use to obtain his automobile dealer's license. The second lease established a shorter term than the first and granted an option to extend. The revised term was required by the licensing agency of the state. The Iowa court ruled as follows, adopting the *Kergil* rule, at page 170:

> The evidence offered by plaintiff would tend to prove that the sole purpose of the second sublease was to provide evidence Sutherland could use to obtain his automobile dealer's license. The implication being that the second sublease was never intended to be effective as between the parties. This evidence was rejected by the trial court when it specifically held the parol evidence rule in connection with such evidence was not aplicable.
>
> The rule urged by plaintiff is: "A writing may be executed between parties without any intention of affecting legal relations. Such a writing may concern merely transactions of friendship and the like, or it

may be for some ulterior purpose, although it is in reality inoperative and is a sham." 20 Am Jur., Evidence, section 1097, page 957. However, this exception is itself subject to a gloss that where the sham aims at an evasion of the law or a deception of other persons it will not be recognized as an exception to the parol evidence rule. *The entire matter is well put and soundly decided in the Oregon court in the following languages*:

> "Thus, the principal question is: Will the law permit consideration of oral evidence denying the validity of the written memorial of the parties when such oral evidence shows the written document was executed for the purpose of defrauding or misleading a third party?
>
> "The courts are not of a single mind upon this issue. We confess, the majority of jurisdictions at the present time, based upon pure logic, admit the evidence on the basis that such testimony is offered, not to vary the terms of the written instrument within the letter of the parole evidence rule, but only to show the parties never intended the written instrument to be a binding agreement.
>
> "The difficulty with this view is that it overlooks the moral aspects of the situation. It permits the law to be used to lend its aid to those who would mislead or defraud third parties without providing any restraining penalty upon their immoral actions."

. . .

The trial court in its decree properly recognized that plaintiff's evidence indicated the sole purpose of the second sublease was to perpetuate a fraud on

the state. We cannot now ignore this second sublease under the rule cited. (Emphasis supplied.)

Higby v. Hooper, 124 Mont. 331, 221 P. 2d 1043 (1950), a Montana case, likewise adopted the *Kergil* rule.

> Under certain circumstances, none of which is here present, a person may show that the document in question was intended to serve the purpose of a mere jest, joke or sham. "But a just policy would seem to concede this only when the pretence is a morally justifiable one (as, to calm a lunatic or to console a dying person). When it is *morally beyond sanction,* or aims at an *evasion of the law* or a deception of other persons, by intention of the parties, that intention will not be given effect." 9 Wigmore on Evidence, 3d Ed., sec. 2406, subd. (1), pp. 16, 17.
>
> The law does not allow parties to a contract to show that it was got up as a sham to deceive and defraud. *Graham v. Savage,* 110 Minn. 510, 126 NW 394, 396, 136 Am. St. Rep. 527, 19 Ann. Cas. 1022. So here the defendant will not be permitted to defeat his own solemn written contract by saying that it was given solely for a fraudulent and deceitful use. "He is estopped thus brazenly to assert his own covinous purpose." *Hunter v. Bryan,* 92 Wash. 469, 159 P. 703, 704. See R. C. M. 1947, sec. 13-801. *Cf. Federal Farm Mortgage Corp. v. Hatten,* 210 La. 249, 26 So. 2d 735; *Ewing v. Ford,* 31 Wash. 2d 126, 195 P. 2d 650; *Fereria v. Nunn,* Cal. App. 1950, 220 P. 2d 20; *Young v. Neill,* Or. 1950, 220 P. 2d 89, 94.

The rule of *Kergil, Mock and Carolina Casualty* cases appears to have previously received the approbation of this court in another case arising in the U. S. District Court for the District of Oregon, wherein Judge Gus J.

Solomon was the trial judge. *West Los Angeles Institute for Cancer Research v. Mayer,* 366 F. 2d 220 (1966). Although the *Kergil* rule was not followed in that case (which was tried to the equity side of the court), it was recognized and cited with approval in footnote 12 at page 227 and distinguished.

Appellee submits that the rule of the *Kergil* case is soundly established beyond dispute as the controlling and current rule of the law of Oregon, where some contractual relationship existed between the disputing parties, which relationship one party contends rests on an oral agreement rather than on their written memorial.

Appellant suggests in his opening brief, at page 32, that the case of *Story v. Hamaker,* 84 Or. Adv. Sh. 145, 432 P. 2d 185 (1967), casts doubt that the Oregon court would follow the *Kergil* case in this appeal. However, the appellant's own brief points up the very apparent distinction which the court noted. It is also to be borne in mind that the *Story* case does not even discuss the *Kergil* rule nor cite any case authority, nor did the briefs on appeal in that case make reference to the *Kergil* rule or any of the cases following it. The *Story* case is one in which the court found no contractual relationship existed between any of the parties unless the same arose out of a real estate contract which the court found was a sham and under which there had been no performance of any

kind. The alleged purchaser had never gone into possession despite the elapse of four years and had made no payments, nor had the Veterans Department acted thereon and made the contemplated loan. The court found no intent on the part of either seller or purchaser to do anything as between themselves pursuant to the alleged contract to sell. Here, in the instant case, Krause contracted with Smith Canning & Freezing Co. to haul pea vines and did haul pea vines; and appellant agreed to pay for the hauling and did make part payment therefor. The contract was fully performed by appellee. The dispute here relates to which of two alleged contracts is to be enforced. In the *Story* case the dispute was as to whether there was any contract at all to be enforced. The distinction is clear and readily apparent. It cannot be seriously contended that the *Story* case in any sense abridges or overrules the *Kergil* case and those following it.

The Legal Doctrines of Modification, Discharge, Performance or Release Are Not Applicable.

Appellee does not quarrel with the general rule that subsequent acts of the parties affecting and bearing upon their contractual relationship can be generally shown by parol evidence. However, this rule is wholly inapplicable under the facts of this case. There is no evidence showing modification, discharge, performance, release or abrogation of the written contract of the parties. The only evi-

dence even approaching such a state of facts is to be found in the testimony of Mr. Stoddard (Tr. 55-56, 59), the depositions of Mr. Stoddard (Ex. 8, p. 9-11), the testimony of Mr. Krause (Tr. 65-67) and his deposition (Ex. 7, p. 28, 29, 35, 38).

The fair thrust of this testimony is that appellant's witness says appellant was billed weekly by appellee and that appellee was paid weekly at the rate of $4.75 per hour. Appellee, on the other hand, testified that the weekly billings and weekly payments covered payment of only a portion of the agreed rate. The statements submitted by appellee (Ex. 12) clearly show both the $4.75 rate, the approved rate (higher rate), and the *difference* between the two rates. Each of those columns was extended and totaled, so that each weekly statement disclosed the balance still owing for the week's hauling after crediting the contemporaneous weekly payment. How then can it be seriously argued that the parties, even through agents, (whose authority so to do is not established) settled their account weekly, or effected an accord and satisfaction, or effected a modification of their written agreement, or effected a discharge or release, or accepted part performance and waived further performance?

Moreover, as disclosed by the myriad of cases hereinbefore cited, suits on contracts for public carriage speci-

fying a rate prescribed by or subject to the approval of an appropriate governmental regulatory body are not subject to the defenses of fraud, waiver, estoppel, mistake or any other traditional defense, short of payment of the approved rate. The defenses asserted by appellant are inaplicable here, in view of the declared public policy against rate discrimination.

CONCLUSION

The judgment of the trial court should be sustained, upon the authorities cited herein, (1) to assure to the appellee his entitlement under the law and the written memorial of the parties; and (2) to effectuate the declared public policy of the sovereign State of Oregon prohibiting rate discrimination between carriers and prohibiting deception by sham contracts entered into for immoral intendments.

Respectfully submitted,

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and
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Attorneys for Appellee

CERTIFICATE

I certify that in connection with the preparation of this brief I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

DATED this ..... day of October, 1967.

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of Attorneys for Appellee

APPENDIX

ORS 756. 580 Suits to set aside findings and order of of commissioner. (1) Parties to any proceedings before the commissioner may, when aggrieved by any findings of fact, conclusions of law or order, including the dismissal of any complaint or application by the commissioner, prosecute a suit or proceedings against the commissioner to modify, vacate or set aside such findings of fact, conclusions of law or order.

(2) Such suit may be commenced by any party so aggrieved in the Circuit Court for Marion County, in the circuit court for the county in which any hearing is held in the proceedings in which the order was made, or in the circuit court for the county in which is located the principal office of any defendant in any such proceedings before the commissioner, and jurisdiction of any such suit hereby is conferred upon the circuit court for any of such counties to hear and determine such suit.

(3) In such suit, a copy of the complaint shall be served with the summons. The commissioner shall serve and file his answer to such complaint within 10 days after the service thereof, whereupon the suit shall be at issue and stand ready for trial upon 10 days' notice by either party. All suits brought under this section shall have precedence over any civil cause of a different nature pending in the court, and the circuit court always shall be open for the trial thereof. Any such suit shall only be commenced within 90 days after the filing of the order in the proceeding before the commissioner.

ORS 767.005 (5) "Common carrier" means:

(a) Any person who transports for hire or who holds himself out to the public as willing to transport for hire, compensation or consideration by motor vehicle, persons

or property, or both, for those who may choose to employ him; or

(b) Any person who leases, rents or otherwise provides a motor vehicle for the use of others and who in connection therewith in the regular course of business provides, procures or arranges for, directly, indirectly or by course of dealing, a driver or operator therefor.

ORS 767.020 Declaration of policy. (1) The business of operating as a motor carrier of persons or property for hire upon the highways of this state is declared to be a business affected with the public interest, and that regulated competition is desirable when it is deemed to be in the public interest.

(2) The rapid increase of motor carrier traffic and the fact that under existing law many motor trucks, trailers and busses are not effectively regulated, have increased the dangers and hazards on public highways and make it imperative that:

(a) More stringent regulations should be employed, to the end that the highways may be rendered safer for the use of the general public;

(b) The wear of such highways be reduced;

(c) Minimum of inconvenience to other users of the highways be effected;

(d) Minimum hindrance and stoppage to other users of the highways compatible with needs of the public for adequate transportation service, be effected;

(e) The highways be safeguarded from improper use or unnecessary usage;

(f) Operation by irresponsible persons or any other

operation threatening the safety of the public or detrimental to the general welfare be prevented;

(g) Discrimination in rates charged be eliminated;

(h) Congestion of traffic on the highways be minimized;

(i) The various transportation agencies of the state be adjusted and correlated so that public highways may serve the best interest of the general public; and

(j) Statutes be passed to provide a method of assessing privilege taxes to enable the further construction of highways and to provide for the operation, preservation and maintenance of highways already built.

(3) The legislature hereby declares that to effect the ends and purposes listed in this section, this chapter is adopted.

ORS 767.055 When carrier is prima facie common carrier. Evidence that any carrier holds or has obtained at any time, in his own name or for his benefit, contracts for the transportation of property with more than five shippers or consignees, is prima facia evidence that such carrier is, in fact, a common carrier. Showing may be made to the contrary by, for or on behalf of such carrier by evidence overcoming such prima facie evidence.

ORS 767.105 Necessity for permit for commercial transportation of persons or property on public highways. (1) No person shall operate any motor vehicle, whether loaded or empty, on any highway in this state as a common carrier, contract carrier or private carrier in the transportation of persons or property or both without first applying for and obtaining, in addition to any license required by any other law, a permit from the commissioner covering the proposed operation.

(2) Every person who engages for compensation to perform a combination of services which includes transportation of property of others upon the public highways is subject to the jurisdiction of the commissioner as to such transportation and shall not engage upon the same without first having obtained a common carrier or contract carrier permit to do so.

ORS 767.125 Applications for permits. (1) The commissioner shall prescribe forms of applications for permits for the use of applicants and shall make regulations for the filing thereof.

(2) On the case of common carriers and contract carriers, the application shall state:

(a) The ownership, financial condition, equipment to be used and the combined weight thereof;

(b) The physical property of the applicant;

(c) Character of service, whether transportation of property or of persons;

(d) The district or territory in which the operation is to be conducted, and if upon regular route, the termini thereof; and

(e) Such other information as the commissioner may require.

(3) [Private carrier not applicable here.]

ORS 767.190

. . .

(e) Has repeatedly refused or has repeatedly failed, after having been requested to do so, to furnish service

authorized by permit or granted by license. The commissioner in such cases may also, in his discretion, restrict the permit or license to conform with operations conducted.

(f) Has not, except for reasons beyond his control, furnished service authorized by his permit or license for a period exceeding six consecutive months immediately preceeding the filing of the complaint in the proceeding; or, in the case of a common or contract carrier authorized to transport logs, poles or piling, has not, except for reasons beyond his control, furnished service authorized by his permit or license to transport logs, poles or piling for a period exceeding 12 consecutive months immediately preceding the filing a complaint in the proceeding. The commissioner in such cases may also, in his discretion, restrict the permit or license to conform with operations conducted.

ORS 767.420 Contract carriers, regulation of. (1) The commissioner shall supervise and regulate all contract carriers of persons or of property, or both, and, with respect thereto, exercise and perform all the powers and duties stated as subsections (1), (2), (3), (6) and (7) of ORS 767.405, except that he shall not require contract carriers to be or become common carriers.

(2) No contract carrier shall give or cause any undue or unreasonable advantage or preference to those whom he serves as compared with patrons of any common carrier, or subject the patrons of any common carrier to any undue or unreasonable discrimination or disadvantage, or by unfair competition destroy or impair the service or business of any common carrier or the integrity of the state's regulation of any such service or business.

(3) To the end that the commissioner may enforce these provisions, each contract carrier, except carriers engaged exclusively in transporting logs, poles or piling, shall file with the commissioner copies of his contract, immedi-

ately upon the making of such contract, including the rates, fares, charges and practices called for or contemplated in the performance of the contract, for review and revision and approval or modification as to rates, fares, charges and practices by the commissioner. No contract carrier shall enter upon the performance of any contract contemplated by this section, until approval of such contract has been given by the commissioner.

(4) The commissioner has jurisdiction over said rates, fares, charges and practices to the same extent as is required by ORS 767.410, in the case of common carriers, and ORS 767.410 is by this reference made applicable to contract carriers and the commissioner shall apply and enforce the same accordingly; provided, the commissioner has no authority to fix rates on agricultural, horticultural, poultry, dairy, livestock, timber or livestock products in the transportation from the point of origin to packing or processing plants, or from the point of origin or from packing or processing plants to the nearest market or shipping points, when not transported in competition with common carriers or railroads.

ORS 767.470 Civil penalty for violation of chapter or order of commissioner. (1) In addition to all other penalties provided by law, every person who violates or who procures, aids or abets in the violation of this chapter or any order, rule, regulation or decision of the commissioner shall incur a penalty of $100 for every such violation.

(2) Each such violation shall be a separate offense and in case of a continuing violation every day's continuance is a separate violation. Every act of commission or omission which procures, aids or abets in the violation is a violation under this section and subject to the penalty provided in this section.

(3) Such penalty shall not be imposed except by

order following complaint and hearing as provided in ORS 756.520 to 756.570. Such proceeding may only be commenced within two years following the date of the violation complained of.

(4) The commissioner may, upon written petition therefor received within 15 days after the penalty order is served, mitigate any penalty provided for in this section or discontinue any action at law to recover the same upon such terms as he deems proper.

(5) If the amount of such penalty is not paid to the commissioner, the Attorney General shall bring an action in the name of the State of Oregon in the Circuit Court of Marion County to recover such penalty. The action shall not be commenced until after the time has expired for an appeal from the findings, conclusions and order of the commissioner. In all such actions the procedure and rules of evidence shall be the same as an ordinary civil action except as otherwise provided in this chapter.